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No. 05-1535

IN THE

Supreme Court of the United States

DAVID HAMILTON; SARAH HAMILTON, A MINOR,
PETITIONERS

v.

WASHINGTON STATE PLUMBING & PIPEFITTING INDUSTRY PENSION PLAN; PLUMBERS & PIPEFITTERS NATIONAL PENSION FUND; WESTERN WASHINGTON U.A. SUPPLEMENTAL PENSION TRUST; AND MARY HAMILTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Petitioners David and Sarah Hamilton reply as follows to the Brief for Respondents in Opposition to Petition for Writ of Certiorari.

I. RESPONDENTS' BRIEF CONFUSES THE ISSUES PRESENTED FOR REVIEW.

The issue raised by the Petition is whether the state court in a domestic relations proceeding can ever make an assignment of death benefits to the children of a pension plan participant that will be enforceable against a spouse whom the participant later marries. Insofar as the Parties have been able to determine, that issue has not been decided by any previous Federal District Court or Circuit Court of Appeals.

Respondents' attempt to restate the issue is inappropriate for the following reasons:

1. This case does not present the question of whether a surviving spouse's annuity rights can be *extinguished*, because the lump sum death benefits claimed by Petitioners were assigned by a domestic relations order that was entered upon the divorce of their father, before he retired or married Respondent Hamilton. They were therefore removed from the benefits that remained payable with respect to the participant, and to which the survivor rights of Respondent Hamilton could attach.

2. This case does not present the question of whether the mandatory surviving spouse annuity can be paid to the children of a former marriage, because Petitioners are not claiming a surviving spouse annuity. They are claiming an

altogether different form of benefit which, under each of the Respondent Plans, is payable in a lump sum to beneficiaries including the participant's children upon the participant's death.

3. This case does not present the question of whether a domestic relations order that is silent as to whom the surviving spouse annuity must be paid can become a "Qualified Domestic Relations Order", because the domestic relations order specifically identifies Petitioners as the beneficiaries of the lump-sum death benefits that they are claiming.

II. THE DECISION BELOW IS NOT SUPPORTED BY OTHER APPELLATE TRIBUNALS.

Respondents rely on *Samaroo v. Samaroo*, 193 F.3d 185 (3rd Cir. 1999); *Dorn v. International Brotherhood of Electrical Workers*, 211 F.3d 938 (5th Cir. 2000); and *Boggs v. Boggs*, 520 U.S. 833 (1997). However, *Samaroo* and *Dorn* involved the question of whether survivor rights can be transferred to a former spouse by a QDRO that refers only to benefits payable during the participant's lifetime. *Boggs* involved the question of whether interests in a pension plan can be transferred by the will of a former spouse. Those issues are separate and distinct from the issue addressed by this Petition, of whether a QDRO can transfer benefits payable upon a participant's death to alternate payees other than the former spouse.

Thus in *Samaroo*, the former spouse sued to recover survivor benefits under a divorce decree that awarded only a share of the retirement benefits paid to

the participant during his lifetime. The Court held that the decree did not support her claim, because it did not specifically address survivor benefits. 193 F.2d at 187, n.2.

Likewise in *Dorn*, the former spouse obtained a QDRO which gave her a share of what was "unmistakably" the annuity payable to the participant during his retirement. 211 F.3d at 947. She then claimed that her payments should continue after the participant's death. As in *Samaroo*, the court denied her claim because the QDRO awarded only a share the participant's lifetime benefits. 211 F.3d at 947. The court stated in dictum that if the former spouse had been claiming a survivor annuity, which she was not (211 F.3d at 946), her claim would have failed because the QDRO did not address survivor benefits. 211 F.3d at 947.

Samaroo and *Dorn* are nothing more than applications of the requirement in Section 206(d)(3)(C) of ERISA, 29 U.S.C. §1056(d)(3)((C), that the QDRO must clearly specify the "nature and portion" of the benefits that it purports to assign. *Dorn*, 211 F.3d at 943, 947; *Samaroo*, 193 F.3d at 987, n.2. They do not justify the ruling below that no matter how specific the QDRO may be, it cannot assign death benefits except in the form of a survivor annuity payable to a former spouse. Moreover, the opinion in *Dorn* contradicts the ruling below by stating that a QDRO can assign *any* benefit payable with respect to a participant to *any* statutorily permitted alternate payee. *See* Section IV, below.

The *Boggs* decision holds that pension benefits can be transferred only by means of a QDRO, and not as community property interests under the will of a former spouse. It does not seek to limit the benefits

that can be transferred by means of a QDRO or the alternate payees to whom they can be transferred. Moreover, the opinion in *Boggs* undermines the ruling below by recognizing that the QDRO provisions are designed to benefit the participant's children and other dependants as will as his former spouse. 520 U.S. at 846-47.

The *Boggs* opinion states as noted by Respondents that ERISA contains survivor annuity provisions to insure an income stream for the *surviving spouse*, and anti-waiver provisions which require the *spouse* to consent if the participant attempts to designate someone else as his beneficiary. 520 U.S. at 843. However, these are separate provisions which operate at different times. The provision that requires spousal consent to a beneficiary designation refers to the person who is the spouse *when the designation is made.* It does not refer to a hypothetical person whom the participant might marry at some later date. *See* 29 U.S.C. §1055(c)(1)(B). In this case Petitioners' mother was the spouse when the participant agreed to designate them as his death beneficiaries, and she consented to that designation. The requirement of consent by Respondent Hamilton applies only after she married the participant, and only to the portion of the participant's benefit that was not awarded by the domestic relations order. *See* Treas. Reg. § 1.401(a)-13(g)(4)(B)(2)

III. THE DECISION BELOW IS NOT SUPPORTED BY LOWER FEDERAL AND STATE COURTS.

The state and federal district court decisions cited by Respondents do nothing more than reiterate the holdings in *Samaroo* and *Dorn* that a QDRO must refer

specifically to survivor benefits in order to assign a survivor annuity.

Thus in *Robson v. Electrical Contractors Association Local 134 IBEW Joint Pension Trust of Chicago, Pension Plan No. 5*, 727 N.E.2d 692 (Ill.App. 2000) (as modified upon denial of rehearing Apr.12, 2002), the participant neglected to change his beneficiary designation after the divorce. A domestic relations order was entered at the time of divorce which awarded the former spouse 50% of the pension benefits that had accrued during the marriage. After the participant died the former spouse claimed survivor rights with respect the portion of pension benefits that had *not* been awarded to her. 727 N.E.2d at 698. Her claim was denied because the domestic relations order did not mention of survivor rights, and contained a waiver provision which terminated whatever rights she might otherwise have had as designated beneficiary. 727 N.E.2d at 698, 699. The present case is precisely the opposite in that the domestic relations order *required* Petitioners to be named as the participant's beneficiaries.

The *Stahl* decision merely cites to the holdings in *Dorn* and *Samaroo* that a former spouse cannot be considered a surviving spouse without being specifically designated as such by a QDRO. *Stahl v. Exxon Corporation*, 212 F.Supp. 657, 668 (S.D.Tex. 2002).

To the same effect are the New York authorities cited by Respondents. In *Kazel v. Kazel*, 770 N.Y.S.2d 420 (2003), aff'd 786 N.Y.S.2d 420 (2004), the QDRO entered at the time of divorce awarded only a share of the participant's monthly allowance. The former spouse sought to have the state court modify the QDRO after the participant died to give her a share of the survivor

benefits. The Supreme Court, Appellate Division, ruled against the former spouse because the QDRO was required to confirm to the divorce judgment, and there was no showing that the divorce judgment awarded a share of the participant's death benefits. 770 N.Y.S.2d at 241; 786 N.Y.S.2d at 421. The Court of Appeals affirmed on the ground that the pension benefits payable after a participant's death are distinct from those payable during his lifetime, and cannot be awarded by a QDRO that refers only to latter. 786 N.Y.S.2d at 421, 422.

In *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15 (1984), the court upheld a domestic relations order which required that a portion of each pension check received by the participant should be paid to the former spouse according to a formula which related the duration of the marriage to the duration of benefit accrual. 463 N.E.2d at 18, 22. In the *Hoke* case cited by Respondents, the court held only that a domestic relations order which requires pension benefits to be apportioned according to the *Majauskas* formula will not be construed to include death benefits unless the order specifically addresses them. *Hoke v. Hoke*, 811 N.Y.S.2d 528, 529-30 (2006).

The foregoing authorities contain absolutely nothing to support the ruling below that a QDRO which awards a death benefit to an alternate payee other than a former spouse cannot be enforced against someone whom the participant later marries, no matter how specifically it is drafted.

IV. THE PETITION IS SUPPORTED BY DICTA IN THE CASE LAW AND GUIDANCE FROM THE DOL.

Respondents argue that Petitioners cite no case which holds that an alternate payee's rights under a QDRO supersede those of a surviving spouse if survivor benefits are not specifically assigned. By the same token, Respondents cite no case which holds that a QDRO which specifically assigns a death benefit to children must be subordinated to the survivor rights of someone the participant later marries. Nor do Respondents cite any case to support their argument that the statutory survivor annuity must be specifically addressed in a QDRO which assigns some other form of death benefit. That is because the issue presented by this case is one of first impression.

However, Respondents err in stating that the case law provides no support for the Petition. ERISA states that a QDRO may assign "all or a portion of the benefits payable *with respect to* a participant...." 29 U.S.C. §1056(d)(3)(B). The *Dorn* opinion cited by Respondents states that:

> "Use of the phrase 'with respect to' makes clear that alienability under a QDRO is not limited to those benefits that are 'payable to' a participant, i.e., only the participant's life annuity, *but may also make other plan benefits, such as the surviving spouse's annuity, available to an alternate payee.*"

211 F.3d at 943, n.11 (emphasis added). That includes the death benefits claimed by Petitioners in this case.

Respondents err further in stating that the Petition is unsupported by DOL guidance. In *Matter of Gail Inman-Campbell*, DOL Advisory Opinion No. 2000-09A, Pens. Plan Guide (CCH) P 19,988F (2000 WL 979928), July 12, 2000, the DOL stated as in *Dorn* that the scope of assignments permitted for QDROs is

defined by ERISA section 206(d)(3)(B) to include benefits payable "with respect to a participant," and that:

> In using this particular language, Congress made clear that the QDRO provisions are intended to enable State courts or agencies to assign *any and all* benefits payable under a plan that a participant has earned through employment.
>
> Further, any assignment effected by a QDRO necessarily has the effect of requiring the substitution of an alternate payee for the individual (participant or beneficiary) who would otherwise be entitled to receive the benefit under the terms of the plan in question....

2000 WL 979928 (E.R.I.S.A.), p.4. That would again include the death benefits claimed by Petitioners.

V. A DISTRIBUTION REQUIRED BY A QDRO IS A DISTRIBUTION PURSUANT TO THE TERMS OF THE PLANS.

Respondents argue that plan benefits must be distributed according to the plan provisions, and that under the second parts of National Plan Paragraph 7.01 and State Plan Paragraph 7.05, no lump sum benefit is payable if a qualified preretirement survivor annuity is payable to the participant's spouse. However, those provisions apply only if a qualified preretirement survivor annuity is payable. Insofar as a QDRO has assigned death benefits to a former spouse or children of the participant, a preretirement survivor annuity is not payable and the provisions cited by Respondents do

not apply. For example, Paragraph 6.05 of the National Plan states:

> Any rights of a former spouse or other alternate payee under a Qualified Domestic Relations Order, with respect to a Participant's pension, shall take precedence over those of any later Spouse or the Participant under this Article.

Even if the plans lacked such language, it would be implied. ERISA requires that every pension plan "shall provide" for the payment of benefits in accordance with a QDRO. 29 U.S.C. §1056(d)(3)(A). Therefore, a distribution of benefits required by a QDRO is necessarily a distribution pursuant to the provisions of the plan. The courts have recognized that the provisions requiring adherence to QDROs take precedence over other provisions in the event of a conflict. *Blue v. UAL Corp.*, 160 F.3d 383, 385 (7th Cir. 1998).

VI. MISSTATEMENTS OF FACT AND LAW

Section IV of Respondent's Brief is intended to comply with Supreme Court Rule 15.2, which requires Respondents to identify perceived misstatements of fact and law. However, Respondents' Section IV does not identify any fact, case, or statutory provision that they claim to have been misstated. It states only conclusory arguments in opposition to Petitioner's contention that the decision below intrudes upon matters reserved for the state courts and undermines their ability to protect children in divorce proceedings.

However, the objective of protecting the children of divorcing parents was recognized clearly in

Boggs v. Boggs, 520 U.S. at 847. The decision below obstructs that objective in this case by barring an award of death benefits to Petitioners in lieu of life insurance which their father was too ill to obtain, even though both parents wanted the award. Such decisions should be left to the parents and the state court. Congress did not intend to intrude upon them by enacting ERISA. *Boggs v. Boggs*, 520 U.S. at 847-48. Moreover, the decision below would subordinate the interests of children who are before the state court, and whose needs are real and immediate, for the sake of a purely hypothetical surviving spouse that might never even come into existence. Congress is not likely to have intended such a result.

CONCLUSION

The extent to which ERISA may limit the authority of state courts in divorce cases is an issue of great importance with broad societal implications. This Court should grant the Petition so that the issue raised by the decision below can be thoroughly considered and decided for the guidance of future domestic relations proceedings.

DATED this 31st day of August, 2006.

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